

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JOSHUA CARY MYERS,

Plaintiff,

v.

RODGER WHOMES, ESQ.,

Defendant.

Case No. 3:16-cv-115-MMD-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiff's application to proceed in forma pauperis (Electronic Case Filing (ECF) No. 1) and pro se complaint (ECF No. 1-1).

**I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that this provision applies to all actions filed in forma pauperis, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person, who is unable to prepay the fees in a civil case, may apply to the Court for authority to proceed *in forma pauperis*. The application shall be made on the form provided by the Court and shall include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

1 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some  
 2 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
 3 (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir. 1960)). A litigant need not "be  
 4 absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont De Nemours &*  
 5 *Co.*, 335 U.S. 331, 339 (1948).

6 When a prisoner seeks to proceed without prepaying the filing fee:  
 7 [I]n addition to filing the affidavit filed [as described above], [the prisoner] shall  
 8 submit a certified copy of the trust fund account statement (or institutional  
 9 equivalent) for the prisoner for the 6-month period immediately preceding the  
 10 filing of the complaint or notice of appeal, obtained from the appropriate official  
 11 of each prison at which the prisoner is or was confined.  
 12 28 U.S.C. § 1915(a)(2). Notwithstanding the foregoing:

13 [I]f a prisoner brings a civil action...in forma pauperis, the prisoner shall be  
 14 required to pay the full amount of a filing fee. The court shall assess and, when  
 15 funds exist, collect, as a partial payment of any court fees required by law, an  
 16 initial partial filing fee of 20 percent of the greater of--  
 17 (A) the average monthly deposits to the prisoner's account; or  
 18 (B) the average monthly balance in the prisoner's account for the 6-month period  
 19 immediately preceding the filing of the complaint or notice of appeal.  
 20 (2) After payment of the initial partial filing fee, the prisoner shall be required to  
 21 make monthly payments of 20 percent of the preceding month's income credited  
 22 to the prisoner's account. The agency having custody of the prisoner shall forward  
 23 payments from the prisoner's account to the clerk of the court each time the  
 24 amount in the account exceeds \$10 until the filing fees are paid.

25 28 U.S.C. § 1915(b)(1), (2).

26 Plaintiff's financial certificate reveals that his average monthly balance is \$79.45, and his  
 27 average monthly deposits are \$109.21. (ECF No. 1 at 5.) Plaintiff's application to proceed in  
 28 forma pauperis should be granted; however, Plaintiff is required to pay an partial initial filing  
 fee in the amount of \$21.84, and is required to pay the remainder of the filing fee over time  
 pursuant to 28 U.S.C. § 1915.

## 29 **B. SCREENING**

30 Under 28 U.S.C. § 1915A, the court is required to "review, before docketing, if feasible,  
 31 or in any event, as soon as practicable after docketing, a complaint in a civil action in which a  
 32 prisoner seeks redress from a governmental entity or officer or employee of a governmental  
 33 entity." 28 U.S.C. § 1915A. In such a review, the court must "identify cognizable claims or  
 34 dismiss the complaint, or any portion of the complaint, if the complaint--(1) is frivolous,

1 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief  
2 from a defendant who is immune from such relief.”

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same  
5 standard under Section 1915(e)(2)(B) when reviewing the adequacy of the complaint or amended  
6 complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review  
7 under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,  
8 232 F.3d 719, 723 (9th Cir. 2000).

9 In reviewing the complaint under this standard, the court must accept as true the  
10 allegations of the complaint, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976),  
11 construe the pleadings in the light most favorable to plaintiff, and resolve all doubts in the  
12 plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se  
13 complaints are held to less stringent standards than formal pleadings drafted by lawyers, and  
14 must be liberally construed. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404  
15 U.S. 519, 520-21 (1972) (*per curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

16 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
17 action," it must contain factual allegations sufficient to "raise a right to relief above the  
18 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
19 must contain something more...than...a statement of facts that merely creates a suspicion [of] a  
20 legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and  
21 Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough  
22 facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*,  
23 556 U.S. 662, 678 (2009).

24 A dismissal should not be without leave to amend unless it is clear from the face of the  
25 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
26 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
27 1103, 1106 (9th Cir. 1995) (dismissed as frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
28 Cir. 1990).

1     **B. Plaintiff's Complaint**

2             Plaintiff files this action pursuant to 28 U.S.C. § 1983, against Rodger Whomes, Esq, in  
3     his individual capacity. (ECF No. 1-1.) He alleges that Mr. Whomes was acting as counsel for  
4     Plaintiff (in an underlying criminal action), and conspired with Christan Wilson and Jennifer P.  
5     Noble in coercing Plaintiff into taking a plea deal. (*Id.* at 3, 4.) He asserts that Mr. Whomes  
6     served as a prosecutor for twenty plus years and was masquerading as a defense attorney to scare  
7     defendants into taking plea deals. (*Id.* at 4.) Plaintiff alleges that in doing so, Mr. Whomes  
8     violated his due process rights under the Fifth, Eighth, and Fourteenth Amendments. (*Id.* at 4-6.)

9             Insofar as Plaintiff is asserting a claim of ineffective assistance of counsel, such a claim is  
10    properly raised in a petition for writ of habeas corpus, following exhaustion of applicable state  
11    remedies. *See* 28 U.S.C. § 2254.

12            To the extent Plaintiff is challenging his conviction as a result of entry into a plea deal,  
13    his claim is barred. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (“[W]hen a state prisoner seeks  
14    damages in a § 1983 suit, the district court must consider whether a judgment in favor of the  
15    plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the  
16    complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence  
17    has already been invalidated.”). Plaintiff alleges that he is still in custody of the Nevada  
18    Department of Corrections, and that his conviction is invalid due to Mr. Whomes coercing him  
19    into a plea deal. The success of this claim implies the invalidity of his conviction. Therefore, this  
20    action should be dismissed; however, the dismissal of the action is without prejudice so that  
21    Plaintiff may renew it in the event he succeeds in invalidating his conviction. *Belanus v. Clark*,  
22    796 F.3d 1021, 1025 (9th Cir. 2015) (citing *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th  
23    Cir. 1995)).

24            In the event Plaintiff is successful in invalidating his conviction and seeks to renew this  
25    action, he is advised that Mr. Whomes passed away in January of 2014. If Plaintiff is able to  
26    renew this action in the future, he must first determine whether his claims survive Mr. Whomes’s  
27    death, and if so, sue the proper defendant. *See* Fed. R. Civ. P. 25.

28    ///

**III. RECOMMENDATION**

**IT IS HEREBY RECOMMENDED** that the District Judge enter an order:

(1) **GRANTING** Plaintiff's application to proceed in forma pauperis (ECF No. 1); however, pursuant to 28 U.S.C. § 1915(b), he is still required to pay the full amount of the filing fee over time. Within thirty days of the date of any order adopting and accepting this report and recommendation, Plaintiff should be required to pay an initial partial filing fee of \$21.84. Thereafter, Plaintiff should be required to make monthly payments of twenty percent of the preceding month's income credited to his account to be forwarded by the agency having custody over Plaintiff to the Clerk of this court each time the amount in Plaintiff's account exceeds \$10 until the filing fee is paid.

(2) Directing the Clerk to **FILE** the complaint (ECF No. 1-1); and

(3) **DISMISSING** the action **WITHOUT PREJUDICE**, and administratively close this action.

Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

DATED: March 10, 2016.

  
\_\_\_\_\_  
WILLIAM G. COBB  
UNITED STATES MAGISTRATE JUDGE